89-233

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No._____

IN THE

Supreme Court of the United States

October Term 1989

THE GRAND LODGE OF TEXAS (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as Trustee for Masonic Home and School of Texas, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, NEW MEXICO, a corporation,

Petitioners,

v

ELIZABETH McCLELLAND GANT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In a diversity of citizenship action, can the United States District Court take jurisdiction of an action to construe a testamentary trust that has already been construed by the State Probate Court under the Probate Court's statutory authority and overrule the decision of the probate court?

2. In a diversity of citizenship action, can the United States District Court and the Court of Appeals refuse to apply the limitation provisions of State statutes and the State Supreme Court decisions construing the statutes?

3. In a diversity of citizenship action, can the United States District Court take jurisdiction of a course of action that a state district court has no jurisdiction over under the decisions of the State Supreme Court?

4. Can the United States District Court assume jurisdiction to administer the assets of a trust estate when the assets of the trust estate are already under the control and supervision of a state district court?

PARTIES

All parties are named in the caption.

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Petitioners,

vs.

ELIZABETH McCLELLAND GANT,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit entered on March 20, 1989.

OFFICIAL AND UNOFFICIAL REPORTS BELOW

Neither the Tenth Circuit Order and Judgment nor the trial court's decision as contained in its Findings of Fact and Conclusions of Law nor its Memorandum Opinion have been reported. The appendix hereto contains these document.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. § 1332(a)(1), the diversity of citizenship statute, this action was filed in the United States District Court for New Mexico on November 24, 1986. The United States District Court entered its Findings of Fact and Conclusions of Law on January 7, 1988, and a Memorandum Opinion and Judgment on February 10, 1988 (Appendix hereto A-1, A-2, A-3).

On Petitioners' appeal and Respondent's cross-appeal, the court of appeals entered its Order and Judgment on March 20, 1989 (Appendix B). Petitioners filed a Motion for Rehearing and Suggestion for Rehearing En Banc on March 31, 1989 (Appendix C), which Motion was denied by Order entered on May 11, 1989 (Appendix D). A Motion to Stay or Recall the Mandate was filed on March 30, 1989, which Motion was denied by Order entered on May 11, 1989. Petitioners next filed a Motion in the district court for a Stay of Enforcement of the Judgment and Approval of Supersedeas Bond pursuant to Rule 44.2 of the Supreme Court rules and 28 U.S.C. § 2101(f). This Motion was denied by Order entered by the district judge on July 17, 1989.

Jurisdiction of the Supreme Court to review the Judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The New Mexico statutes which were in effect when the will establishing the testamentary trust was construed by the probate court provided:

> "16-410. **Jurisdiction of probate court.** — The probate courts shall have exclusive original jurisdiction in all the following cases, to wit: The probate of last wills and testaments, the granting of letters testamentary and of administration and the repealing or the revocation of the same, the appointment and removal of administrators, the appointment and removal of guardians of minors, the settlement and allowance of accounts of executors, administrators and guardians, the hearing and determination of all controversies respecting wills, the right of executorship, administration and guardianship, the hearing and determination of all controversies respecting the duties, accounts and settlements of executors, administrators and guardians, the determination of heirship, the hearing and determination of all controversies respecting any order, judgment or decree in such probate courts with reference to any of the foregoing matters of which the probate courts are herein given exclusive original jurisdiction, and no suit shall be prosecuted or begun in any district court to review or in any manner inquire into or reopen or set aside any such order, judgment or decree, and no such order, judgment or decree shall be reviewed or examined in any district court except upon an appeal taken in the manner provided by law. . ."

The New Mexico statute in effect at the time and which placed a limitation on the time within which an appeal from the probate court's judgment could be taken provided:

> "16-418. **Appeal to district court — Time — Motion for appeal — Bond — Transmission of papers — Docketing — Trial — Amendment of objections.** — Any person aggrieved by any decision of any probate court of any county in this state, may appeal to the district court of the county in which such decision may be rendered, by filing within ninety (90) days of the rendering of any such

decision with the clerk of such probate court a motion praying such appeal and a bond, with two (2) or more sureties, conditioned that such appellant shall prosecute his said appeal with diligence and effect, and pay all costs of such appeal as shall lawfully be adjudged against him; and, thereupon it shall be the duty of said probate clerk to prepare and forthwith transmit to the district court of said county all such papers and copies of all such records as such appellant shall in writing designate as necessary to be considered upn said appeal, and upon the receipt of the clerk of said district court of said papers from said probate clerk, the said clerk of said district court shall docket said appeal and papers as a cause and said district court and thereafter said appeal so docketed as aforesaid shall be tried de novo and determined in said district court as other causes are therein tried, and determined. In any proceeding of accounting or settlement by an executor or administrator or by the representative of a deceased executor or administrator now or hereafter pending on appeal for trial de novo in any district court of this state, any party to the proceeding may amend to his objections filed to the accounting or settlement, and may file additional objections thereto, and any heir, creditor, successor of a deceased executor or administrator, or any other person interested in the estate, may intervene therein and file his objections to such accounting and settlement. . . ."

STATEMENT OF CASE

The present action was filed by Respondent, as a life-time beneficiary of a trust, on November 24, 1986, against the Defendant, Citizens Bank of Clovis, Trustee, and the Grand Lodge of Texas, residuary beneficiary of the trust, to construe the trust as contained in a last will and testament which was admitted to probate in the Probate Court of Curry County, New Mexico, on January 6, 1941. By Order entered on February 19, 1942, the probate court construed the trust as contained in the will and determined the amount Respondent was to receive from the trust estate "so long as she shall

live." The Order was entered pursuant to the probate court's jurisdiction and authority as contained in § 16-410 of the New Mexico statutes in effect at the time. The Order also transferred jurisdiction of the trust estate to the District Court of Curry county, New Mexico. This Order is part of the record in the cause. The Respondent failed to appeal the probate court's decision within the time specified in § 16-418 of the New Mexico statutes. Under a decision of the New Mexico Supreme Court, a state district court has no jurisdiction to review a decision of the probate court that has not been appealed within the time specified in the statute.

By Order entered on February 21, 1942, the state district court assumed jurisdiction of the trust estate and again determined the amount Respondent was to receive out of the trust estate "so long as she shall live." This Order is also a part of the record in the cause.

The present case was tried on its merits, and after trial, the United States District court, by its Decision and Judgment entered on March 20, 1988, construed the will to require a substantial increase in the amount of annual payments due Respondent out of the trust estate from the amount that had previously been determined to be due her by the probate court and state district court.

The court of appeals in its Order and Judgment entered on March 20, 1988, summarily affirmed the trial court's decision. It failed to decide or even mention the following issues that had been raised by the Petitioners in their appeal:

1. The issue of whether a Federal district court has jurisdiction to overrule and set aside an order and decision of a state probate court that had construed a will pursuant to its authority and jurisdiction under a state statute, which order and decision had been approved by a state district court.

2. The issue of whether a Federal district judge can assume jurisdiction over the administration of a trust estate that has been administered by a state district court for over forty-six (46) years.

These issues were again raised by Petitioners in a Motion for Rehearing and Suggestion for Rehearing En Banc (Appendix C). The Motion was denied (Appendix D).

REASON FOR GRANTING THE WRIT

If the caseload and resulting burden on the federal courts under 28 U.S.C. § 1332(a) is ever going to be curtailed or controlled, the Supreme court must consider and reverse those cases where the lower courts refuse to follow the Supreme Court's prior decisions, as in the present case.

1. **The lower court refused to follow Supreme court decisions that require them to apply the state statutes and decisions in diversity cases.**

In *Erie v. Tompkins*, 1938, 58 S Ct. 817, 304 U.S. 64, 82 L Ed. 1188, the Supreme court mandated federal courts to follow state substantive law in diversity cases. This is also required under 28 U.S.C. § 1652, the Rules of Decision Act.

In *Guaranty Trust Co. of New York v. York*, 1945, 65 S Ct. 1464, 326 U.S. 99, 89 L Ed. 2079, the court held that a state statute of limitations barred an action in federal court in a diversity action. Justice Frankfurter, in analyzing the *Erie* decision stated at 65 S Ct. 1470, 326 U.S. 109:

> "In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determining the outcome of litigation, as it would be if tried in state court."

The decision holds that a state statute completely barring a recovery in the state court clearly determines the outcome of the case in federal court. Further, under the Rules of Decision Act, state statutes of limitation are binding in a diversity case.

In the present case, the probate court entered its order on February 19, 1942, construing the will that created the trust estate and determined the amount the Respondent was to receive annually out of the trust estate. The probate court, in 1942, had the jurisdiction and authority to do this under § 16-410 of the New Mexico statutes, which provided:

> "The probate court shall have exclusive jurisdiction in all of the following cases, to wit: . . . the determination of heirship, the hearing and determination of all controversies respecting any order, judgment, or decree in such probate court with reference to any of the foregoing matters of which the probate courts are herein given exclusive jurisdiction, and no suit shall be prosecuted or begun in any district court to review or in any manner inquire into or reopen or set aside any such order, judgment, or decree, and no such order, judgment, or decree shall be reviewed or examined in any district court except upon an appeal taken in the manner provided by law."

The Respondent failed to appeal the decision pursuant to § 16-418 of our New Mexico statutes which provided:

> "Any person aggrieved by any decision of any probate court of any county in this state, may appeal to the district court of the county in which such decision may be rendered, by filing within ninety days of the rendering of any such decision with the clerk of such probate court a motion praying such appeal and a bond, with two (2) or more sureties, conditioned, that such appellant shall prosecute his said appeal with diligence and effect. . ."

The precise issue was before the New Mexico Supreme Court in *First National Bank v. Dunbar*, 32 N.M. 419, 258 P 817. Here the supreme court held that the district court lost jurisdiction to set aside an order of the probate court by failure of a party to appeal to the district within the ninety days provided in the statute; that the state district court could not entertain a separate action to set aside the order of the probate court. This decision was never reversed or modified and is the law in New Mexico. If the state district court had no jurisdiction to overrule or set aside the 1942 order of the probate court in a separate action, then obviously the federal district court had no such jurisdiction in the present action which was filed some forty-six years after the order of the probate court.

> ". . . the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in state court."
> (*Guaranty Trust Co. of New York v. York, supra.*)

2. **The lower court refused to follow the Supreme Court decisions and the decisions of the Tenth Circuit in taking jurisdiction of a suit involving the Respondent's rights to a trust estate, which issue had already been determined in state court.**

Respondent's right to payment from the trust estate had been determined by the state probate court in 1942. The administration of the trust estate was assumed by the state district court in 1942 and continued until the present action was filed.

In *Princess Lida of Thurn & Taxis v. Thompson*, 1939, 59 S Ct. 275, 280-281, 305 U.S. 456, 466, 83 L Ed. 285, the Supreme Court stated:

> "We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that

> jurisdiction to the exclusion of the other is not restricted to cases where property has been actually seized under a judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, *administer trusts*, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property." (emphasis supplied)

See also *U. S. v. Bank of New York and Trust Co.*, 1936, 56 S Ct. 343, 347, 296 U.S. 463, 477, 80 L Ed. 331; *Penn Gen. Cas. Co. v. Pennsylvania*, 1935, 55 S Ct. 386, 388, 294 U.S. 189, 195, 79 L Ed. 850; *Palmer v. Texas*, 1909, 29 S Ct. 230, 233, 212 U.S. 118, 129, 53 L Ed. 435.

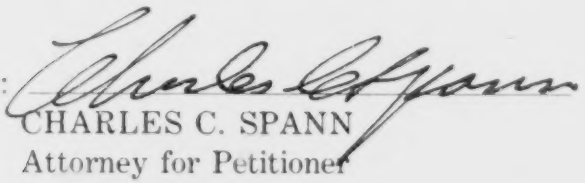
An almost identical factual situation was present in *Buck v. Hale*, C.A. 10th 1976, 536 F.2d 1330, where two great grandchildren of a settlor of a trust asserted they were discretionary income beneficiaries and residual beneficiaries of the trust and sought income payments that allegedly were not made in accordance with the terms of the will. The federal court held it did not have jurisdiction in matters relating to the administration of the trust. This decision was affirmed by the Tenth Circuit. See also *Swenson v. Bates*, C.A. 10th, 170 F.2d 640. The court of appeals refused to follow the Supreme Court decisions and its own decisions in determining the issue as to the jurisdiction of the federal court to entertain the action that was filed by Respondent herein.

The lower court in its Memorandum Opinion dated February 10, 1988 (Appendix A-2), attempted to distinguish *Princess Lida v. Thompson* by quoting language that is irrelevant to the facts of the present case. The language quoted refers to cases where there has been no prior determination of an issue which was submitted to the federal court for decision. In our present case, the issue was the right of Respondent to payments from the trust estate, and this had already been determined by the state courts.

CONCLUSION

The Petition should be granted because of the summary manner in which the lower courts have treated the legitimate jurisdictional issues that were raised in this case. If attorneys cannot rely on judicial precedents and decisions in evaluating cases, they cannot responsibly represent clients and determine a course of action in litigation. When the lower courts refuse to follow these precedents and decisions, then the only recourse for private litigants is through certiorari in the Supreme Court.

SPANN, LATIMER & HOLLOWWA

By: 

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APPENDIX A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELIZABETH McCLELLAND GANT,

Plaintiff,

vs. CV No. 86-1415 JP

THE GRAND LODGE OF TEXAS (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as Trustee for Masonic Home and School of Texas, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, NEW MEXICO, a corporation,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following a non-jury trial during which the parties presented their evidence, including testimony and exhibits, I have reviewed the evidence and pertinent legal authorities and now make the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a):

FINDINGS OF FACT

1. Plaintiff Elizabeth McClelland Gant is a citizen of Arizona; Defendant The Grand Lodge of Texas (Ancient, Free and Accepted Masons) [The Grand Lodge A.F. and A.M.], a corporation, is a citizen of Texas; Defendant The Citizens Bank of Clovis, New Mexico, is a citizen of New Mexico; the amount in controversy exceeds $10,000.00, exclusive of interest and costs.

2. In this lawsuit plaintiff, in good faith and for probable cause, sought a construction of the meaning and effect of the Last Will and Testament of Joe C. McClelland, her grandfather, with respect to testator's intended disposition of the income of the testamentary trust established by his will.

3. Joe C. McClelland validly executed his Last Will and Testament on December 13, 1938 at Clovis, New Mexico.

4. At the time of the execution of the will, plaintiff was 20 years old and was married, and she was identified in her grandfather's will by her married name, Elizabeth Maye McClelland Bell.

5. The provisions of the will reflect the intent of Joe C. McClelland to leave his entire estate in trust.

6. The provisions of the will reflect the intent of Joe C. McClelland that the trustees of his testamentary trust were to dispose completely of the testamentary trust income in the following manner:

a. To pay annually to his granddaughter, the plaintiff, an amount sufficient to insure her an adequate living during her lifetime; and

b. To pay $75.00 a month to his friend and associate A. J. Nichols during his lifetime; and

c. To pay annually to defendant The Grand Lodge A.F. and A.M. for the benefit of the Masonic Home and School of Texas, for a period of 20 years following death of plaintiff, all trust income in excess of the payment of $75.00 per month to A. J. Nichols during his lifetime; and

d. To accumulate, during the lifetime of the plaintiff, any income exceeding the amounts paid to the plaintiff and to A. J. Nichols.

7. Testator intended the defendant The Grand Lodge of Texas A.F. and A.M. for the benefit of the Masonic Home and

School, an orphanage, to be the sole beneficiary of the entirety of his estate remaining after payment of the bequests of certain income to plaintiff and to A. J. Nichold during their lifetimes.

8. Testator intended the bequest and devise to The Grand Lodge A.F. and A.M. for the benefit of the Masonic Home and School to be a memorial to and in honor of his son, Alton Chisum McClelland, who was the father of plaintiff and who had died before testator executed his will.

9. By the terms of his will, testator intended that the trust income, in excess of amounts required to provide an adequate living for plaintiff during her lifetime and to pay A. J. Nichold $75.00 per month during his lifetime, be accumulated by the trustees for a charitable purpose, which was the establishment of a memorial gift to an orphanage in the memory and honor of testator's son, the plaintiff's father.

10. The will did not contain a provision explicitly directing the trustees to accumulate excess trust income, but the testator's intent that they do so is implied from various provisions of the will, including the testator's direction that the entire remainder of his estate be a memorial to his deceased son, the plaintiff's father.

11. Testator intended the provision of his will instructing the trustees to pay plaintiff $1,800.00 per year to be a measure of what testator believed would insure plaintiff an adequate living as of the date testator executed his Last Will and Testament but not to be a limitation on the amount of future annual payments sufficient to insure plaintiff an adequate living.

12. Testator authorized and directed the trustees to pay amounts sufficient to insure plaintiff an adequate living out of trust income, but authorized payment out of principal, if necessary.

13. As of 1987, the year of trial, $42,000.00 is the annual amount that would be consistent with testator's intended meaning of his bequest of an amount sufficient to insure plaintiff an adequate living.

14. Testator did not intend by his will to leave to his granddaughter during her lifetime the entire trust income in excess of the $75.00 per month testator gave to his friend A. J. Nichols during his lifetime.

15. The Last Will and Testament of testator, Joe C. McClelland, was admitted to probate in Cause No. 1240, Probate Court of Curry County, New Mexico, in which the executors filed a Final Report and Account, plaintiff filed a waiver acknowledging receipt of the Final Report and Account, and the Court entered its Order Approving Final Account and Report of Executors on February 19, 1942, ruling that Joe C. McClelland had died testate, that the plaintiff was the sole and only heir at law of the testator and that plaintiff was entitled to $1,800.00 per year, payable $150.00 monthly, under the terms of the will.

16. None of the documents filed in Cause No. 1240, Probate Court of Curry County, New Mexico, including the executors' Final Report and Account, the plaintiff's waiver and the Probate Court's Order Approving Final Account and Report of Executors, addressed the questions of whether the gift of $1,800.00 per year would insure the plaintiff an adequate living over her lifetime or whether the plaintiff was entitled to all of the income of the trust in excess of the $75.00 per month given to A. J. Nichols.

17. At the time of probate of the will of Joe C. McClelland, plaintiff was his sole living heir under the law of intestate succession.

18. Beneficiary A. J. Nichols died in 1943.

19. Plaintiff was represented by an attorney with regard to the probate proceedings.

20. $1,800.00 per year insured plaintiff an adequate living as of 1942 when the Order Approving Final Account and Report of Executors was filed in the probate proceedings.

21. Plaintiff did not intend, by the documents filed on her behalf in the probate proceedings, to waive her right to claim in the future, under her grandfather's will, amounts exceeding $1,800.00 per year should increased amounts be necessary to insure plaintiff an adequate living.

22. The issue of whether the will provision directing the trustees to pay plaintiff $1,800.00 per year was intended by testator to be the amount to be paid plaintiff annually throughout her lifetime or was merely testator's then measure of, but not a lifetime limitation on, an amount which would insure plaintiff an adequate living was not raised, contested or litigated in the probate proceedings.

23. In 1948 plaintiff filed a petition in the District Court of Curry County, New Mexico, No. 6857, requesting the court to construe the will to entitle her to an amount exceeding $1,800.00 per year so as to provide her an adequate living; in Cause No. 6857 plaintiff and defendants stipulated to increase the monthly payments made from the trust to plaintiff to the sum of $3,000.00 per year, but to reserve and not waive any legal or equitable rights under the will or a proper construction of the will.

24. In 1951 plaintiff and defendant The Grand Lodge A.F. and A.M. entered into a stipulation filed in Cause No. 6857, District Court of Curry County, New Mexico agreeing to increase the amount paid from the testamentary trust to plaintiff to $325.00 per month beginning January 1, 1952 and reserving and not waiving any legal or equitable rights under the will or a proper construction of the will; the District Court

of Curry County entered an order approving the stipulation and ordering the trustees to pay plaintiff $325.00 per month.

25. In 1960, 1968, 1973, and 1981, at the request of the trustees, court orders were entered successively increasing the amounts paid to plaintiff; the last increase, in 1981, was to $1,800.00 per month ($21,600.00 per Year).

26. Plaintiff did not, in Cause No. 1240, Probate Court of Curry County, New Mexico, assert claims (a) that she was entitled to all trust income for life, in excess of the amounts of income given to A. J. Nichols, or, alternatively (b) that there was a partial intestacy as to such income from which she would benefit or, alternatively, (c) that such income should be paid to plaintiff under a resulting trust theory; plaintiff did not assert such claims in her 1948 petition in Cause No. 6857, District Court of Curry County, New Mexico, or at any time before 1983, more than 40 years following the closing of her grandfather's estate.

27. Defendants would be prejudiced, by reason of the lapse of time and the unavailability of witnesses and other evidence more than 40 years after closing of the estate, if they now had to defend against claims (a) that plaintiff was entitled to all trust income for life, in excess of the amount of income given to A. J. Nichols, or alternatively (b) that there was a partial intestacy as to such income from which plaintiff would benefit or, alternatively, (c) that such income should be paid to plaintiff under a resulting trust theory.

CONCLUSIONS OF LAW

1. Jurisdiction lies in this court on the basis of diversity of citizenship under 28 U.S.C. § 1332(a)(1).

2. Plaintiff has not, in bad faith, contested the Last Will and Testament of her grandfather, Joe C. McClelland, and the no-contest provision of the will does not apply.

3. The Last Will and Testament is not ambiguous in regard to Joe C. McClelland's intention to dispose of all income of the testatmentary trust established by his will, and his intent that excess income be accumulated can be implied from the terms of the will.

4. Even if the intent of Joe C. McClelland that excess trust income be accumulated cannot be implied from the terms of his will, the better rule is that excess testamentary trust income should be accumulated when the remainder beneficiary of the trust is a charity, where the will has no explicit excess income accumulation provision and the testator's intent regarding excess income cannot otherwise be ascertained from the terms of the will.

5. Testator, by his Last Will and Testament, made a complete disposition of his estate and there was no partial intestacy and no resulting trust should be implied.

6. The proceedings in Cause No. 1240, Probate Court of Curry County, New Mexico, are not **res judicata** as to the amount of annual income plaintiff is entitled to receive from the testamentary trust.

7. Plaintiff did not waive, and is not estopped to assert, her right to request a construction of the will provision under which her grandfather stated his intention to provide plaintiff "an annual income ... sufficient to insure an adequate living for my said granddaughter during her lifetime."

8. Plaintiff's request for construction of the will provision under which her grandfather stated his intention to provide plaintiff "an annual income ... sufficient to insure an adequate living for my said granddaughter during her lifetime" is not barred by laches.

9. Plaintiff's request for construction of the will provision under which her grandfather stated his intention to provide plaintiff "an annual income ... sufficient to insure an

adequate living for my said granddaughter during her lifetime" is not barred by any statute of limitations.

10. Plaintiff's claims (a) that the will should be construed to provide her all trust income during her lifetime in excess of the income given to A. J. Nichols, or, alternatively, (b) that all such income should pass to her as a consequence of partial intestacy, or, alternatively, (c) that all such income should be paid to her under a resulting trust theory are barred by laches.

11. Plaintiff has waived any claims (a) that the will should be construed to provide her all trust income during her lifetime in excess of the income given to A. J. Nichols, or, alternatively, (b) that all such income should pass to her as a consequence of partial intestacy, or, alternatively, (c) that all such income should be paid to her under a resulting trust theory; and plaintiff is estopped to assert such claims.

12. Under the Last Will and Testament, plaintiff is entitled to recover out of trust income, or out of the trust corpus should it become necessary, an annual amount sufficient to insure her an adequate living, which is $42,000.00 as of 1987, the year of trial.

/s James A. Parker

District Judge

APPENDIX A-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELIZABETH McCLELLAND GANT,

Plaintiff,

vs. CV No. 86-1415 JP

THE GRAND LODGE OF TEXAS (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as Trustee, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, NEW MEXICO, a corporation,

Defendants.

MEMORANDUM OPINION

Subsequent to the entry of Findings of Fact and Conclusions of Law following a trial, non-jury, plaintiff requested reconsideration of the ruling that the parties were to bear their own costs and expenses, including attorneys fees, and defendants filed a motion to amend finding of fact No. 13. Having considered the plaintiff's request, the defendants' motion and memoranda of the parties, I will deny both the plaintiff's request and the defendants' motion.

Plaintiff's Request for Costs and Expenses, Including Attorneys Fees

Plaintiff asserts that her request for an award of attorneys fees falls within an exception, recognized in *Gregg v. Gardner*, 73 N.M. 347, 388 P.2d 68 (1963), to the general rule which disallows attorneys fees. The plaintiff in *Gregg* was successful, on appeal, in obtaining a construction of a will in her favor. Similarly, in this case plaintiff has prevailed on one

of her claims for construction of her grandfather's will in her favor. The Supreme Court of New Mexico, however, rejected the successful plaintiff's claim for attorneys fees in *Gregg v. Gardner*, restating the general rule that "in the absence of a statute or rule of court attorneys fees are not taxed as costs or considered as an item of damages ..." and noting that "allowance of attorneys fees has been approved by us in rare instances." 73 N.M. at 360. The only "rare instance" in which attorneys fees were awarded in a will construction case occurred in *Merrick v. Deering*, 30 N.M. 431, 236 P. 735 (1925). The court in *Gregg* observed that in *Merrick v. Deering* attorneys fees were awarded to lawyers "who had brought large sums into a trust through litigation involving construction of a will." 73 N.M. at 360-61. In denying attorneys fees in *Gregg*, the court distinguished *Merrick v. Deering* by pointing out that in *Gregg* "nothing of value was in any way added to the assets of the estate or trust." 73 N.M. at 361. As in *Gregg*, plaintiff Gant in this case has merely shown her right to receive some of the trust assets and has not added value to the trust estate. Consequently, plaintiff's request for attorneys fees must be denied on the basis of the analysis and ruling in *Gregg v. Gardner, supra*. As to other costs and expenses I previously ruled that the parties were to bear their own costs since plaintiff prevailed on only one of several claims. I see no reason to change that ruling.

Dedendants' Motion to Amend Finding of Fact No. 13

Finding of Fact No. 13 states:

> As of 1987, the year of trial, $42,000.00 is the annual amount that would be consistent with testator's intended meaning of his bequest of an amount sufficient to insure plaintiff an adequate living.

Defendants first contend that this finding is unsupported by substantial evidence. The testator, plaintiff's grandfather, in his will specified $1,800 as the annual "amount sufficient to

insure an adequate living for my said granddaughter ..." As of 1938 when he executed his will. Dr. David Hamilton testified that $1,800 would have placed a person within the top 30% of income recipients in the nation in 1938. In addition, he testified that as of 1987 persons having an income within the range of $35,000 to $49,999 would have fallen into the category of the top 30% of income recipients nationwide, but that an income of $1,800 in 1938 would more closely compare to the lower end of the 1987 range of $35,000 to $49,999. This and other evidence supports Finding of Fact No. 13.

Next, defendants argue that a determination in 1981 by the state court, which oversees administration of the testamentary trust, that as of 1981 $21,600 was the amount sufficient to insure plaintiff an adequate living is *res judicata* and that this court has no jurisdiction to determine any increase in that amount which may be necessary to insure plaintiff an adequate living as of 1987. First, it should be noted that in this case the parties consented to trial of the issue of what amount would insure plaintiff an adequate living as of a current date. Second, the cases on which defendants rely do not support their argument. The cases from the United States Supreme Court cited by defendants, *Commonwealth Company v. Bradford*, 297 U.S. 613 (1936) and *Princess Lida v. Thompson*, 305 U.S. 456 (1939) not only fail to support defendants contention of *res judicata* and lack of jurisdiction, but, instead, indicate that the 1981 state court determination was not *res judicata* and that this court had jurisdiction to determine the issue of adequate annual living as of a later date. As stated in the opinion in *Princess Lida v. Thompson*: "An action in the federal court to establish the validity or the amount of a claim, in respect of a trust, constitutes no interference with the state court's possession or control of a *res*." 305 U.S. at 457. The Supreme Court further noted that, although a state court may have asserted jurisdiction over the administration of a trust, this does not preclude

a federal court in a later action based upon diversity of citizenship from deciding issues where "plaintiff seeks merely an adjudication of his right or his interest as a basis of a claim against a fund in the possession of a state court ...." 305 U.S. at 466.

IT IS THEREFORE ORDERED that plaintiff's request for reconsideration of an award of attorneys fees and other costs, and defendants motion to amend finding of fact No. 13 are denied.

s/ James A. Parker
District Judge

APPENDIX A-3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELIZABETH McCLELLAND GANT,

Plaintiff,

vs. CV No. 86-1415 JP

THE GRAND LODGE OF TEXAS (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as Trustee, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, NEW MEXICO, a corporation,

Defendants.

JUDGMENT

This case was tried on its merits, non-jury, on December 17, 1987. Findings of Fact and Conclusions of Law were filed on January 7, 1988. Thereafter plaintiff requested reconsideration of the ruling that the parties should bear their own attorneys fees and costs; the request was reconsidered and the ruling was not changed. Defendants filed a motion to amend finding of fact No. 13 and that motion was denied. By letters to the court the parties have agreed that the annual amount payable from the trust to the plaintiff may be paid in monthly installments.

In accordance with the Findings of Fact and Conclusions of Law it is therefore

ORDERED, ADJUDGED AND DECREED:

1. Defendant Citizens Bank of Clovis, New Mexico, Trustee of the Joseph B. McClelland Testamentary Trust, shall pay to the plaintiff the sum of $42,000 per year in monthlly installments of $3,500 out of trust income, or out of trust corpus if that becomes necessary, for the year 1987 and thereafter until the further order of this court or another court which has jurisdiction.

2. All claims of the plaintiff other than her claim for an annual amount sufficient to insure her an adequate living, which was determined to be $42,000 as of 1987, are hereby dismissed with prejudice.

3. Plaintiff and defendants shall bear their own costs and expenses, including attorneys fees.

s/ _____

JAMES A. PARKER
District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELIZABETH McCLELLAND GANT,	)	
	)	
Plaintiff-Appellee-Cross-Appellant,	)	
	)	
v.	)	No. 88-1359
	)	&
THE GRAND LODGE OF TEXAS, (Ancient Free and Accepted Masons), a corporation as trustee for Masonic Home and School of Texas; MASONIC HOME AND SCHOOL OF TEXAS; THE CITIZENS BANK OF CLOVIS, Clovis, N.M., a corporation,	)	88-1461
	)	(D.C. No. 86-1415-JP)
	)	(D. N.M.)
Defendants-Appellants-Cross-Appellees.	)	

ORDER AND JUDGMENT*

Before McKAY, SEYMOUR, Circuit Judges, and PHILLIPS, District Judge.**

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

**Honorable Layn R. Phillips, District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

Plaintiff Elizabeth McClelland Gant cross-appeals the judgment of the District Court construing the will of her grandfather, Joe C. McClelland. Defendant Grand Lodge of Texas appeals from the same judgment.

Plaintiff also seeks attorney's fees as the prevailing party, which the district court denied. After reading the briefs, examining the record, and hearing oral argument, we are not persuaded that the trial court erred. We affirm the judgment below in all respects, substantially for the reasons given by the district court in its Findings of Fact and Conclusions of Law issued January 10, 1988, and its Memorandum Opinion issued February 10, 1988.

Entered for the Court

Stephanie K. Seymour
Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELIZABETH McCLELLAND GANT,	)	
	)	
Plaintiff-Appellee-Cross-Appellant,	)	
	)	
v.	)	No. 88-1359
	)	&
THE GRAND LODGE OF TEXAS, (Ancient Free and Accepted Masons), a corporation as trustee for Masonic Home and School of Texas; MASONIC HOME AND SCHOOL OF TEXAS; THE CITIZENS BANK OF CLOVIS, Clovis, N.M., a corporation,	)	88-1461
	)	(D.C. No. 86-1415-JP)
	)	(D. N.M.)
	)	
	)	
	)	
Defendants-Appellants-Cross-Appellees.	)	

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

COME NOW the Defendants-Appellants and Cross-Appellees and petition the Court for a rehearing on the Order and Judgment heretofore entered on March 20, 1989, and suggest an **en banc** consideration of Defendants' appeal herein on the following grounds:

1. The action was filed in the District Court of New Mexico under Title 28 U.S.C. § 1332(a)(1) because of diversity of citizenship between the parties.

2. It is elementary that in diversity of citizenship actions, the State law applies.

3. Under § 14-410 of the New Mexico Statutes, 1941 Comp., which was in effect at the time the will in question herein was admitted to probate, the probate courts of New Mexico had exclusive jurisdiction to determine heirship and all other controversies involving the construction of last wills and testaments.

4. The Last Will and Testament of the decedent herein was construed by the Probate Court of Curry County, New Mexico, and an order entered on February 19, 1942, determining heirship under the will and that Plaintiff was entitled to $1,800 per year so long as she shall live out of the trust created by the will.

5. The Order and Decree of heirship was not appealed by Plaintiff to the District Court within ninety days as required by § 16-418, N.M.S.A., 1941 Comp., and under the decision of the New Mexico Supreme Court in *First National Bank v. Dunbar*, 32 N.M. 19, 258 P. 817, the District Court of Curry County, New Mexico, lost jurisdiction to determine any matter concerning the construction of the will.

6. The Federal District Court in New Mexico had no greater jurisdiction under the diversity of citizenship statute than did the District Court of Curry County, New Mexico, and accordingly, its decision and judgment entered some forty-six years later was erroneous.

7. This significant and decisive issue was either overlooked or misconstrued in the Order and Judgment entered on March 20, 1988, and accordingly, a rehearing should be granted and the decision of the United States District Court reversed insofar as it determined the amount the Plaintiff was to receive under the will.

8. Upon information and belief, the failure of the panel to consider the issue will result in future petitions for increases by Plaintiff with resulting costs and expenses to the Trust.

9. By order entered on February 20, 1942, the District Court of Curry County, New Mexico, assumed jurisdiction to administer the trust and to supervise and control the trust estate and all matters in connection therewith.

10. Until the Federal District Court in New Mexico assumed jurisdiction over the trust estate in the present action all matters concerning the trust were handled by the State District Court.

11. By assuming jurisdiction of the trust estate, the U. S. District Court for New Mexico acted contrary to prior decisions of the United States Supreme court and the Tenth Circuit wherein this appellate court held that a Federal court lacked subject matter jurisdiction to construe a trust instrument when the administration of the trust has been assumed by a state district court. The State Court's jurisdiction over the administration of a trust, when it has attached, is exclusive.

12. The undersigned attorney expresses a belief based on a reasoned and studied professional judgment that the panel decision herein is contrary to the following decisions of the United States Supreme Court and of the United States Court of Appeals for the Tenth Circuit, and consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

Princess Lida of Thurn and Taxis v. Andrew A. Thompson, et al., 305 U.S. 456-468

Swenson v. Bates, (10th Cir.) 170 F.2d 640

Buck v. Hales, (10th Cir.) 536 F.2d 1330

Respectfully submitted,
SPANN, LATIMER & HOLLOWWA

By: s/ _____

CHARLES C. SPANN, Attorney for
Defendants-Appellants-Cross Appellees
P.O. Box 1031
Albuquerque, NM 87103
Tele: (505) 243-3525

I certify that a true copy
of the foregoing was mailed
to opposing counsel of record
this 30th day of March, 1989,
by placing a copy of same in
the U.S. Mail, postage prepaid.

s/ _____
CHARLES C. SPANN

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELIZABETH MCCLELLAND GANT, Plaintiff - Appellee,	)	
v.	)	88-1359
	)	88-1461
THE GRAND LODGE OF TEXAS, (Ancient Free and Accepted Masons), a corporation as trustee for Masonic Home and School of Texas; MASONIC HOME AND SCHOOL OF TEXAS; THE CITIZENS BANK OF CLOVIS, Clovis, NM. a corporation, Defendant - Appellant.	)	

ORDER

Before HOLLOWAY, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit judges, PHILLIPS, district Judge.*

This matter comeson for consideration of Appellants/ Cross-Appellees' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

ROBERT L. HOECKER, Clerk

BY: Patrick Fisher, Chief Deputy Clerk

*Honorable Layn R. Phillips, District Judge, U.S. District Court for the Western District of Oklahoma, sitting by designation.